Date: Oct. 7, l996

Case No. 96-STA-1

In the Matter of:

DON JONES,

Complainant,

v.

CONSOLIDATED PERSONNEL CORP.,

Respondent.

APPEARANCES:

Don Jones, Pro Se
Frontenac, Missouri
For the Complainant.

John H. Dowell, Esq.
Chesterfield, Missouri
For the Respondent.

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 [hereinafter referred to as "the Act" or "STAA"], 49 U.S.C. § 2305, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

STATEMENT OF THE CASE

The Complainant, Don Jones [hereinafter referred to as "the Complainant"], filed a complaint with the Occupational Safety and Health Administration, United States Department of Labor, on January 27, 1995, alleging that the Respondent, Consolidated Personnel Corp. [hereinafter referred to as "the Respondent"], discriminated against him in violation of section 405(b) of the Act. The Complainant contends that he was discharged due to his refusal to complete a delivery when fatigued, and also as a result

of his complaints concerning the safety of vehicles that he was assigned to operate. The Secretary of Labor, acting through a duly authorized agent, investigated the complaint and on September 21, 1995, determined that the Complainant failed to prove that the Respondent discharged him for his engaging in protected activities, and accordingly dismissed the complaint. (Ad. Ex. 2)[1]

The Complainant filed objections to the Secretary's findings by way of a letter dated October 13, 1995 and requested a hearing before an Administrative Law Judge. (Ad. Ex. 2) A formal hearing was held before the undersigned on April 23, 1996 in St. Louis, Missouri. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder.

ISSUE

The sole issue in this case is whether the Complainant was discriminated against by the Respondent as a result of having engaged in a protected activity under the STAA.

Based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

The Complainant's employment with the Respondent commenced in July 1989. (Tr. 14) The Respondent is a greater St. Louis based employment agency that provides professional, skilled labor to other companies on a contract basis. (Tr. 57) The Complainant was hired by the Respondent to work as a professional semi-truck, or tractor-trailer, driver. (Tr. 15) In 1989, the Respondent contracted the Complainant to drive delivery trucks for Save-A-Lot food stores. (Tr. 16) During his tenure with Save-A-Lot, the Complainant made local deliveries. (Tr. 17) At some point thereafter, the Complainant was contracted to Illinois Central Railroad (ICG). (Tr. 18) While working for ICG, the Complainant loaded trailers onto railroad cars. Id. About one year later, the Complainant was assigned to drive for Purina Mills, now known as PM Resources. (Tr. 19) The Complainant worked for PM Resources until September 28, 1994. Id.

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[1] In this Decision and Order, "Ad. Ex." refers to Administrative exhibits, "Com. Ex." refers to Complainant's exhibits, "Res. Ex." refers to Respondent's exhibits, and "Tr." refers to the transcript of the hearing.

While working for PM Resources, the Complainant's duties included making local deliveries and pick-ups, as well as moving trailers at the company facilities in Earth City and Bridgeton, Missouri. (Tr. 21) During this period, the Complainant's day-to-day direction and control were provided by PM Resources' employees Gary Welton and Roy Maddock. (Tr. 58) While the Respondent paid the Complainant's salary, it maintained no knowledge or control of the Complainant's daily work activities. Id. The Complainant's daily driving assignments were issued to him by either Welton or Maddock without any consultation or reporting to the Respondent.

The events leading up to the controversy now before me took place primarily on September 28 and 29, 1994. During the week of September 26, 1994, the Complainant's co-worker Carl Clayton was on vacation. (Tr. 69) Clayton's position with PM Resources required him to complete mostly over-the-road, or out-of-down, driving assignments. (Tr. 22) Conversely, the Complainant's assignments were most often local, with both pick-up and delivery taking place in the greater St. Louis area. (Tr. 21) When one of the two drivers was on vacation, it was customary for the other driver to complete the vacationer's assignments. (Tr. 23) The Complainant testified that he did not like this arrangement and notified Maddock of his feelings. (Tr. 24) The Complainant told Maddock that PM Resources should hire casual, or temporary, drivers to complete Clayton's assignments while he was on vacation. (Tr. 25) Maddock acknowledged that the Complainant periodically requested the hiring of casual drivers, but that he never specifically requested that a casual driver be hired to complete the September 29 delivery to Kansas City which prompted this complaint. (Tr. 82) The Complainant also acknowledged that he never specifically requested that PM Resources hire a replacement driver for the Kansas City delivery prior to his 8:30 p.m. telephone conversation with Maddock on September 28. (Tr. 38)

On September 26, 1994, the first day of Clayton's vacation, the Complainant completed a short trip to Highland, Illinois and then returned to Bridgeton. (Tr. 69) On September 27, 1994, the Complainant delivered a load to Kansas City and then had an eight hour stop-over in Montgomery City, Missouri. Id. The Complainant reported to work at approximately 6:00 a.m. on Wednesday, September 28, 1994 and completed some local deliveries and yard work. Id. At some point on the morning of September 28, Maddock informed the Complainant that he would make a delivery to Kansas City and St. Joseph, Missouri the next morning. Id. Because the delivery was scheduled to arrive in Kansas City at 7:00 a.m. on September 29, the Complainant would have to begin the trip at approximately midnight that same day. (Tr. 29) Since the Complainant would have to begin his trip around midnight, Maddock told the Complainant to leave work at approximately noon on September 28 so that he could rest prior to the trip. (Tr. 27) Before leaving work, the

Complainant prepared the tractor-trailer for the midnight trip. (Tr. 69)

After leaving work at approximately 1:30 p.m. on September 28, the Complainant attended an appointment with an attorney at approximately 5:00 p.m. (Tr. 32) The Complainant had made the appointment a couple of weeks prior and, at that time, notified Maddock of the appointment. Id. However, on September 28, the Complainant did not inform Maddock that he had an appointment scheduled for later that day. (Tr. 33) Maddock testified that while he vaguely remembers the Complainant informing him of the appointment, he did not realize that the Complainant planned on meeting with an attorney on September 28. (Tr. 83) Rather, Maddock testified that he believed that the Complainant would rest for his midnight trip. (Tr. 71)

At approximately 8:30 p.m. on September 28, the Complainant telephoned Maddock at his residence and informed him that he was not rested and, consequently, would be unable to complete the trip scheduled for midnight. (Tr. 34, 71) Maddock testified that he was surprised and angry upon hearing the Complainant's news. (Tr. 71) The Complainant testified that he told Maddock to get a casual driver to complete the delivery. (Tr. 34) Maddock replied that it was too late to get another driver and that if the Complainant failed to make the delivery, then the delivery would not be made on time. (Tr. 71) Nonetheless, the Complainant refused to take the delivery. Maddock testified that the Complainant told him that he would quit if he was forced to make the midnight delivery. Id. The Complainant stated that Maddock never threatened to discharge him for refusing to complete the delivery. (Tr. 35) The Complainant testified that he never spoke to Maddock again after this telephone conversation. (Tr. 39)

Later that evening, the Complainant returned to the PM Resources facility. (Tr. 89) While there, the Complainant cleaned out his desk, completed his paperwork, and left the company keys and credit cards which had been in his possession. Id. The Complainant testified that Maddock never told him to return such items, but that he did so on his own volition. Id. Upon arriving at work the next day, at approximately 7:30 a.m., Maddock telephoned Louis Waite, Jr., the regional manager for the Respondent. (Tr. 80) Maddock relayed to Waite the details of the Complainant's refusal to drive and apparent resignation. Id. Waite assigned another driver to PM Resources to replace the Complainant and complete the Kansas City/St. Joseph's delivery. (Tr. 81) Maddock later discovered that the Complainant had cleaned out his desk and returned the company keys and credit cards. Id.

Waite testified that the Complainant telephoned him at approximately 10:30 on September 29. (Tr. 59) Waite stated that the Complainant told him about his refusal to complete the midnight delivery to Kansas City and that he had quit his assignment at PM

Resources. Id. The Complainant then asked Waite if he could be reassigned to drive for another company. (Tr. 64) Waite responded that "it would be a cold day in hell" before the Complainant would be reassigned by the Respondent. Id. Waite stated that the Complainant's actions had disturbed a customer, i.e. PM Resources, and Waite could not afford to have such a person working for him. Id. Waite further testified that the Complainant's only complaint about PM Resources was that they required him to work at too fast a pace. (Tr. 62)

On the next day, September 30, 1994, Waite drafted and mailed a letter to the Complainant confirming the telephone conversation of the previous day and stating that the Complainant had "voluntarily quit his job with out (sic) notice." (Com. Ex. 1) The Complainant testified that he did not quit his job with the Respondent; rather, he relinquished his assignment with PM Resources, but hoped to be reassigned by the Respondent to drive for another company. (Tr. 41)

Applicable Law:

Section 405 of the STAA, provides, in pertinent part:

> (b) No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from the employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 2305 (Supp. 1994)

To establish a prima facie case of discriminatory treatment under the STAA, the Complainant must prove: (1) that he was engaged in an activity protected under the STAA; and (2) that he was the subject of adverse employment action; and (3) that a causal link exists between his protected activity and the adverse action of his employer. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). The establishment of the prima facie case creates an

inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). At a minimum, the Complainant must present evidence sufficient to raise an inference of causation. Carroll v. J.B. Hunt Transportation, 91-STA-17 (Sec'y June 23, 1992).

Once the prima facie case is established, the burden of production shifts to the Respondent to present evidence sufficient to rebut the inference of discrimination. To rebut this inference, the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. Id., supra. A credibility assessment of the nondiscriminatory reason espoused by the employer is not appropriate; rather, the Respondent must simply present evidence of any legitimate reason for the adverse employment action taken against the Complainant. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

If the employer successfully presents evidence of a nondiscriminatory reason for the adverse employment action, the Complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. Moon, supra; See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the adverse employment action. The employee must prove both that the asserted reason is false and that discrimination was the true reason for the adverse action. Hicks, supra, at 2752-56.

In addition, under the employee protection provision of the STAA, a joint employer may be held vicariously liable, even in the absence of knowing participation, for the discriminatory act of another. Cook v. Guardian Lubricants, Inc., 95-STA-43 (Sec'y May 1, 1996). In cases involving leasing of drivers to a separate business entity that shares employment responsibilities with the Respondent employer, the two entities are deemed joint employers for determining liability under the STAA. Id. Therefore, even though Consolidated Personnel is the named Respondent, it may be held responsible for not only its actions, but also the actions of PM Resources under the theory of joint employer liability.

Protected Activity:

Under Section 405 of the STAA, protected activity may consist of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal activities, such as complainants to management relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order. 49 U.S.C. § 2305; See also Reed v. National Minerals Corp., 91-STA-34 (Sec'y Decision, July 24, 1992); Davis v. H.R. Hill Inc., 86-STA-18 (Sec'y Decision, March 18, 1987). Additionally, a driver's refusal to drive during conditions which the driver

considers to present a bona fide danger of injury constitutes a protected activity under the Act. 49 U.S.C. § 2305(b). However, the Act offers protection only if a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury or serious impairment of health resulting from the unsafe condition. Yellow Freight Systems, Inc. v. Reich, 38 F.3d 76 (2nd Cir. 1994).

The Complainant testified that he refused to report to work at midnight on September 29, 1994 because a previously scheduled appointment for earlier that day had prevented him from resting. Thus, without sufficient rest, the Complainant believed it would be unsafe for him to make the midnight delivery to Kansas City, approximately a five and one-half hour drive from St. Louis. The Respondent argued that the Complainant was released from duty at noon on September 28, 1994 so that he could have approximately twelve hours of free time to prepare, i.e. rest, for the midnight drive.

An employee engages in protected activity when he refuses to operate a commercial motor vehicle where such operation would constitute a violation of a commercial motor vehicle safety or health rule or regulation, including Department of Transportation (D.O.T.) hours of service regulations. Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y Aug. 31, 1992). To qualify for such protection, an employee must have sought from his employer, and been unable to obtain, correction of the unsafe conditions causing him apprehension of injury to himself or to the public. Refusal to work because of fatigue or in adhering to hours of service regulations constitutes protected activity under the Act. Brown v. Besco Steel Supply, 93-STA-30 (Sec'y Jan. 24, 1995); Self v. Carolina Freight Carriers Corp., 91-STA-25 (Sec'y Aug. 6, 1992).

Upon review of the record, I find that D.O.T. hours of service regulations played no part in the Complainant's refusal drive on September 29, 1994. Prior to the scheduled midnight drive, the Complainant had been given the previous twelve hours off from work. Nonetheless, the Complainant alleged that he would not be able to complete the drive because he had not slept since the previous evening. The Complainant informed his superior, Roy Maddock, that a previously scheduled appointment with an attorney on the afternoon of September 28, 1994 had prevented him from acquiring the rest necessary to enable him to complete the midnight delivery.

As a result, I find that the Complainant has failed to establish that he engaged in a protected activity. The Complainant's refusal to drive was not caused by the Respondent's insistence on him violating D.O.T. hours of service regulations or otherwise requiring excessive performance. Rather, the Respondent complied with D.O.T. regulations by providing the Complainant with eight hours off from work prior to the scheduled midnight drive. Moreover, the Complainant did not notify the Respondent of his

refusal to drive until 8:30 p.m. on September 28, even though he knew that he would not be able to rest that afternoon when he was assigned the job on the morning of September 28. The Complainant testified that he had previously scheduled the appointment with the attorney for the afternoon of September 28 and planned on keeping the appointment even though PM Resources had given him the afternoon off to rest for the midnight drive. Furthermore, even though the Complainant knew he had an appointment for that afternoon, he did not inform Maddock of such appointment until after the fact.

With the exception of telling Maddock during the 8:30 p.m. telephone conversation to hire a casual driver to complete the Kansas City/St. Joseph's delivery, the Complainant never objected to the delivery scheduled for midnight, nor did he seek correction of the potentially unsafe condition. On September 28, 1994, PM Resources' other driver, Carl Clayton, had been on vacation for two days. During this period, the Complainant completed Clayton's over-the-road assignments without complaint. While the testimony indicates that the Complainant had, in the past, requested hiring the casual drivers, he did not specifically request a replacement for the September 29 delivery. Additionally, while the Complainant may have given notice to Maddock of his afternoon appointment on September 28, he did so weeks in advance and never notified Maddock of the appointment again. Thus, PM Resources was without notice that the Complainant believed that his completing the midnight trip on September 29 would be problematic.

I find that it is unreasonable to hold Maddock responsible for remembering the Complainant's appointment on September 28, especially when the Complainant had ample opportunity to inform Maddock on the day of the appointment, whereby PM Resources would have been put on notice of the potential conflict with the Complainant completing the midnight delivery. Rather, the Complainant waited until 8:30 p.m. on September 28, only three and one-half hours prior to the scheduled commencement of the midnight delivery, to inform PM Resources of his inability to drive. I find that such a refusal to drive, when the Complainant had been provided the necessary eight hour resting period, does not constitute protected activity under the Act. See, e.g., Palinkas v. United Parcel Service, 95-STA-30 (ALJ Dec. 13, 1995) (complainant's work refusal based on alleged emotional problems does not constitute protected activity)

Consequently, I find that neither the documentary evidence nor testimony from witnesses establish that the Complainant sought corrections of unsafe driving conditions at PM Resources.[2] I find

[2] The Complainant also testified about his safety complaints regarding a truck he often was assigned to drive during his tenure at PM Resources. (Tr. 45) Through its agent Roy Maddock, PM

that the record indicates that the Complainant's refusal to drive was not based on safety concerns but rather the Complainant's personal desire not to complete the midnight delivery to Kansas City. As a result of the lack of supporting evidence, I find that the Complainant has not established by a preponderance of the evidence that he engaged in protected activity under subsection (b) of Section 2305 of the Act.

As the Complainant has failed to prove that he engaged in protected activity under the Act, he has failed to establish an essential element of his prima facie case. Consequently, his complaint must be dismissed. Even assuming, arguendo, that the Complainant's actions constituted protected activity, his complaint against the Respondent would nonetheless fail for the reasons discussed below.

Rebuttal of the Prima Facie Case:

The Secretary has ruled that once a case has been tried on the merits, the question of whether a prima facie case was presented is not particularly useful in the analysis. White v. Maverick Transportation, Inc., 94-STA-11 (Sec'y Feb. 21, 1996); See also Carroll v. U.S. Dept. of Labor, 78 F.3d 352 (8th Cir. 1996)(circuit

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Resources acknowledged the poor condition of the truck in question as well as the Complainant's earlier complaints. (Tr. 73) However, Maddock stated that the truck was a "yard dog" and was only used for work at the company facility or for local deliveries. Id. Furthermore, this truck was not scheduled for the September 29 trip to Kansas City, and the Complainant testified that the truck scheduled for the Kansas City trip was "a nice truck." (Tr. 51)

Consequently, I find that while the Complainant's complaints about the condition of the "yard truck" could potentially rise to the status of protected activity under the Act, in this case, such complaints do not constitute protected activity. I base this finding on the facts of the case including, but not limited to, the following: 1) the allegedly unsafe truck was only used as a "yard truck" and not for over-the-road use; 2) despite his complaints, the Complainant never refused to drive the "yard truck" and he drove the truck on September 28, 1994, his last day working for PM Resources; and 3) the controversy surrounding the September 29 trip to Kansas City did not involve the "yard truck" in any way.

Furthermore, even if the Complainant's complaints about the "yard truck" are considered protected activity, such complaints nevertheless fail to sustain a successful cause of action under the STAA. As aforementioned, the "yard truck" played no part in the events of September 28 and 29 which led to the termination of the Complainant's employment with the Respondent. Such being the case, absolutely no casual link exists between the Complainant's complaints about the "yard truck" and any actions taken against him by the Respondent.

court approved Secretary's analysis). Thus, the key issue to be resolved is whether the adverse employment action taken against the Complainant was based upon legitimate, nondiscriminatory reasons, or rather, founded in discrimination. If the Complainant cannot prevail on this ultimate question of liability, it does not matter whether a prima facie case is presented. White, supra.

As discussed in detail above, the Complainant refused to complete his driving assignment just three and one-half hours before its scheduled commencement. Thus, the Complainant's actions left PM Resources with no alternative but to cancel the scheduled delivery and reschedule it with another driver. The Complainant's actions in this regard cannot be overlooked. Even if the Complainant's work refusal constituted a protected activity, his delay in notifying his superiors of this refusal was unreasonable. The Complainant testified that he knew of his appointment for the afternoon of September 28 and that he would be unable to rest in preparation for the midnight trip. Nonetheless, at the time he was given the assignment, on the morning of September 28, the Complainant failed to notify his superiors of the conflict. Rather, his actions indicated to PM Resources that he would complete the scheduled delivery. While at work on the morning of September 28, the Complainant prepared the truck and trailer for the delivery. (Tr. 69) When Maddock asked the Complainant if he needed directions for the trip, the Complainant informed him that the delivery would not be a problem. (Tr. 75) Subsequently, after the close of business and after the possibility of finding a replacement driver for the midnight trip, the Complainant notified Maddock of his inability to complete the delivery.

Thus, based on the Complainant's unprofessional behavior in failing to timely notify his superiors of his inability to complete the delivery, PM Resources presented a legitimate, nondiscriminatory reason to terminate its employment relationship with the Complainant.[3] Furthermore, the Respondent also presented legitimate business reasons for refusing to reassign the Complainant to another position. The Complainant's unprofessional behavior angered one of the Respondent's clients and caused the client to miss a scheduled delivery. Quite understandably, the Respondent, in acting in its own best business interests, chose not to reassign the Complainant to another company and risk a repeat of his past unprofessional behavior. Thus, the record clearly establishes

[3] In actuality, the record indicates that PM Resources did not terminate the employment relationship. Rather, the Complainant testified that, in the early morning hours of September 29, 1994, he cleaned out his desk and returned company items to PM Resources. The Complainant testified that he was not asked to return these items, which included keys and company credit cards. The Complainant testified that returning these items and cleaning out his desk were his "idea." (Tr. 89)

legitimate, nondiscriminatory reasons for the termination of the Complainant's employment with both PM Resources and Consolidated Personnel. Moreover, the record is void of any evidence which would establish that the Respondent's proffered reasons are a mere pretext for discrimination.

Conclusion

Based on the foregoing, I find that the Complainant has failed to prove by a preponderance of the evidence that the Respondent violated the employee protection provision of the STAA. Accordingly,

ORDER

IT IS ORDERED that the complaint of Don Jones for relief under the Act be DISMISSED.

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DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE

This Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. See 61 Fed. Reg. 19978 and 19982 (1996).

The parties may file with the Secretary briefs in support of or in opposition to the administrative law judge's decision and order within thirty days of the issuance of that decision unless the Secretary, upon notice to the parties, establishes a different briefing schedule.

Date:

MEMORANDUM FOR: ROBERT REICH
Secretary of Labor
U.S. Department of Labor
Room S-20l8
200 Constitution Ave., N.W.
Washington, DC 202l0

FROM: DANIEL J. ROKETENETZ
Administrative Law Judge

SUBJECT: Don Jones v. Consolidated Personnel
Case No. 96-STA-l

I transmit herewith my Decision and Order issued this date together with the record herein.

Enclosures